United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-2527

United States Court of Appeals

For the Second Circuit.

ROSTAM PUBLISHING CO.,
Plaintiff-Appellant, Appellee,

-against-

ENNIS BUSINESS FORMS INC. (ENTEX PUBLICATION DIVISION),
Defendant-Appellee, Appellant.

On Appeal From the United States District Court for the Southern District of New York

BRIEF FOR PLAINTIFF—APPELLANT, APPELLEE

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Docket No. 74-2527

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BRIEF FOR PLAINTIFF-APPELLANT APPELLEE

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Court below have jurisdiction to stay the Texas action?

2. Having such jurisdiction, did the Court below properly exercise its judicial discretion in refusing to stay the Texas action?

3. Were the claims made by the defendant-appellee in the Texas action required to be stated in this proceeding as a compulsory counterclaim?

STATEMENT OF THE CASE

A. ORDER APPEALED FROM:

Plaintiff-appellant appeals for a memo decision and order (A. 103)* of the United States District Court for the Southern District of New York (Hon. Robert J. Ward) dated October 21, 1974 and from a memorandum order (Hon. Robert J. Ward) dated November 6, 1974 denying plaintiff's motion for leave to re-argue the denial of the stay of the Texas action, (A. 136).

B. FACTS

This action (referred to as the "New York action") was instituted by plaintiff-appellant in the Supreme Court of the State of New York. Service was made outside the State of New York, under the "long arm statute" on the 1st day of December 1971.

The action was brought to recover damages for breach of contract and was commenced by the service of a summons with a demand for judgment.

The plaintiff is a New York corporation engaged in publishing magazines for sale upon the news-stands throughout the United States, Canada and elsewhere wherever English language periodicals are sold. It acquired certain publishing properties from Jalart House, Inc., a publishing company in New York in the month of August 1969. Plaintiff-appellant,

* A. refers to pages of the Appendix.

Rostam Publishing Co. (hereinafter referred to as Rostam) took over certain existing publishing arrangements between Jalart House, Inc. and defendant-appellee Ennis Business Forms Inc. (hereinafter referred to as Ennis). These arrangements were acknowledged by Ennis and subsequently additional titles were published as an extension of the existing agreements (A. 54).

Arrangements for the printing of Rostam's publications were consummated in all cases in the City of New York, with the printing to be performed in Texas. These arrangements between the parties existed until the month of July, 1971, when Ennis was unable to continue printing for anyone.

During the term of the relationship between the parties the plaintiff caused six to seven different titles of magazines to be printed each month by Ennis, all of which were shipped directly by Ennis to various wholesaler and retailer consignees without further handling or intervention on the part of the plaintiff. All bills received from Ennis were paid in full and discounted by Rostam with the exception of three titles printed by Ennis in July of 1971, (A. 110).

During the term of the relationship numerous complaints were received by Rostam that its magazines were being received by wholesale news dealers beyond the scheduled dates arranged with Ennis, that many of the issues were improperly printed, and that apparently false

and misleading shipping completion dates had been submitted by Ennis to Rostam enabling Ennis to be paid far in advance of when it should have been paid, and causing plaintiff's periodicals to miss in many cases the pre-scheduled on sale dates and resulting in loss of sales on Rostam's pre-dated periodicals, which in many cases were placed on sale at a time when competitors' publications bearing the same dates were practically ready to be called off sale, in effect making Rostam's publications outdated, resulting in reduced sales.

After the action was brought in the Supreme Court, New York County, Ennis appeared by its attorneys, Kaye, Scholer, Fierman, Hays & Handler, on December 31, 1971. An agreement was made between counsel that efforts to settle the matter would be conducted providing the litigation remained in status quo (A. 106-108). Rostam's counsel was agreeable. Numerous conferences were held (A. 108). Ennis' counsel kept requesting further time accommodations pending the conclusion of settlement conferences (A. 108). When these settlement discussions proved fruitless, Rostam served its complaint on defendant's counsel on January 31, 1974.

Rostam's complaint consisted of six causes of action as follows:

1. On the first cause of action Rostam sought $20,000 for four defective issues

2. On the second cause of action Rostam alleged that Ennis failed to maintain the shipping and on sale dates as scheduled, interrupting Rostam's cash flow, and concealed and misrepresented such facts causing damage to Rostam in the sum of $410,592.29.

3. The third cause of action related to seven periodicals delivered to Ennis in March and April of 1971 and by reason of Ennis' inability to ship, four of the seven issues were destroyed and Ennis deceived Rostam into believing that the remaining three issues had been shipped by May 24, 1971, whereas in fact that were not completed until July 11, 1971, reducing the possibilities of news-stand sales and further alleging that by reason of said breach plaintiff was damaged in the sum of $11,698.63.

4. The fourth cause of action alleges that on May 24, 1971 Ennis, suddenly, and without prior notice, advised Rostam that they would not be able to produce further issues and to seek other facilities, resulting in six issues being lost to Rostam, for which damages were sought in the sum of $26,000.

5. The fifth cause of action alleged that by reason of Ennis' failure to complete and ship Rostam's periodicals in time to meet the on sale scheduled dates that Rostam lost 15 per cent in gross sales and was damaged in the sum of $418,160.53.

6. The sixth cause of action sought damages for shortages in the sum of $1,716.03.

On February 25, 1974 Ennis petitioned the United States District Court for the Southern District of New York to remove said action by reason of diversity of citizenship. Rostam did not oppose that application.

Ennis, by motion returnable on April 23, 1974 sought to transfer this action to the United States District Court

for the Northern District of Texas but the lower Court by decision and order entered on August 1, 1974 (Hon. Robert J. Ward) denied that application stating (A. 15)

> Defendant's argument in favor of transfer to the Northern District of Texas because of related litigation there is unpersuasive. The pending litigation in Texas between the parties was commenced subsequent to the instant action and should not be accorded weight. The prior litigation even if related is no longer pending so that there would not be the judicial economy which occurs when related cases are tried together.
>
> After reviewing all of the criteria, the Court concludes that defendant's motion to transfer must be denied.

In the meantime Ennis did not answer Rostam's original complaint because in its motion to transfer Ennis also sought further details of the facts set forth in Rostam's original complaint, thereby gaining a period of nearly six months, during which Ennis did not file a responsive pleading.

However, in the interim and on May 20, 1974 Rostam received by certified mail a summons and complaint issued out of a State Court designated as F-116th Judicial District Court of Dallas County, Texas seeking a judgment for $21,798 for the printing of the three August 1971 issues which were both defectively printed as well as shipped late. In addition Ennis sought attorney's fees of $5,000 (A. 17-19). Thereupon Rostam retained counsel in Dallas, Texas and removed that case to the United States District Court for the Northern District

of Texas. It is that action which Rostam sought to stay in the lower Court, and which stay was denied and is the subject matter of this appeal.

Prior to Rostam's order to show cause to stay the Texas proceeding, Rostam served and filed an amended verified complaint in this action, filed in this Court on the 23rd day of September, 1974, which amended complaint was basically the same pleading as stated in Rostam's original complaint with the following changes made therein:

1. The first cause of action increased the claim for defectively printed issues to five in number and increased the claim for damages to $60,742.75 together with an undetermined amount for loss of goodwill.

2. The second cause of action was unchanged

3. The third cause of action remained unchanged

4. The fourth cause of action remained unchanged

5. The fifth cause of action remained unchanged

6. The sixth cause of action remained unchanged

To all intents and purposes the amended complaint was substantially the same pleading as the original complaint. However several extensions of defendant's time to answer the amended complaint were granted by the Court below and Ennis, for the first time, answered the pleading herein on the 1st day of November, 1974.

In the interim and by order to show cause which

was obtained by Rostam on September 24, 1974 (Hon. Robert J. Ward) (A. 3-4) Ennis was required to show cause why it should not be stayed from proceeding with its action in the United States District Court for the Northern District of Texas. Ennis obtained a cross order to show cause seeking to stay Rostam in this action in the lower Court. On October 21, 1974 the lower Court (Hon. Robert J. Ward) (A.103-104) denied both the Rostam and the Ennis orders to show cause leaving both actions to proceed simultaneously. Rostam by letter addressed to the Court (A.112-113) sought re-argument, opposed by Ennis'counsel (A.114-116), and this resulted in a denial of Rostam's request for leave to re-argue, whereupon Rostam served its notice of appeal (A. 137) and Ennis served its cross notice of appeal (A.138).

In Ennis' action in the Northern District of Texas there were numerous proceedings taken by Ennis, the plaintiff therein, with respect to interrogatories ,depositions, and other proceedings which Rostam was required to oppose through the employment of counsel in Dallas, Texas, at substantial expense to Rostam. Up to that point and before these appeals were noticed two State Courts and two United States District Courts became involved in what should have been litigated in one action, that being the one brought by Rostam in the Supreme Court of the State of New York, in which action Ennis could

have asserted as a counterclaim whatever claims it had against Rostam, represented by its complaint in the State District Court of Texas (A. 17-23).

The action of the Court below in denying Rostam's request for a stay required that Rostam file as a defense to the action in Texas all of the material set forth in the original complaint and the amended complaint herein. To have done otherwise would have resulted in Rostam filing an answer consisting of a general denial in the United States District Court for the Northern District of Texas, which would have undoubtedly resulted in the granting of a motion for summary judgment if made by Ennis in that action.

It is Rostam's contention and has been throughout this proceeding that it had priority since its action was commenced in December of 1971 as against the Ennis action having been commenced in the State Court of Texas in May of 1974. In addition Rostam has contended throughout that whatever claim Ennis may have had against Rostam arose out of the same publishing contracts and agreements as did the matters referred to in Rostam's original and amended complaint and that under these circumstances the Federal Rules and Civil Practices, and in particular Rule 13A, required that any claim possessed by Ennis which arose out of the subject matter of Rostam's complaints were compulsory counterclaims which had

to be litigated in the action pending in the lower Court.

SUMMARY OF ARGUMENT

The Court below (Hon. Robert J. Ward) improperly denied Rostam's motion to stay the Texas proceeding and was contrary to the spirit and intent of Federal Rules and Civil Practices 13A since it resulted in a loss of judicial economy, required two Federal Courts to proceed the same litigated matters, and was contrary to the compulsory aspects of that Rule. Rostam having initiated legal proceedings against Ennis prior to any action by Ennis and having selected the lower Court herein as the proper forum, a factor approved by the order of the lower Court dated August 1, 1974 denying Ennis' motion to transfer this action (A. 9-15), from which no appeal has been taken, and the further fact that the subject matter of both the action in the lower Court herein and the action in Texas arise out of the same subject matter should have resulted in a stay being granted against any further proceedings by Ennis in the Texas forum, and the denial thereof, as a matter of law, was improper and should be reversed.

ARGUMENT

POINT I

The Court below has jurisdiction to Stay the Texas Action

Rostam brought suit in New York to recover damages for breaches of several contracts for the printing of Rostam's periodicals, including breaches relating to the August, 1971 editions. Ennis sued 29 months later by bringing action to recover for work, labor and services for the three August, 1971 editions. Both actions were started in the local State Courts, and both were removed to the local U.S. District Court by reason of diversity of citizenship.

Prior to the appeal four Courts have become involved with this action because Ennis belatedly brought action in Texas.

It cannot be reasonably or logically argued that the subject matter of both actions are not directly related since they arise out of the same subject matter, namely the printing by Ennis of Rostam's periodicals.

Ennis' motion to transfer this action to Texas was denied (Hon. Robert J. Ward) (A. 9-15), since the lower Court in its opinion found that the U.S. District Court for the Southern District of New York was the proper forum (A.15).

No appeal was taken by Ennis.

Despite this finding by the lower Court, Ennis continued with a multiplicity of intermediate proceedings in the U.S. District Court for the Northern District of Texas (A. 7-8). This called for the plaintiff to expend additional funds for Texas counsel, and concurrent proceedings to take place in New York and Texas which could and should have been under the sole supervision and dominion of the Court below. Ennis has thus visited a form of legal attrition upon Rostam contrary to the judicial economy resulting from one trial in New York.

This Court has consistently held that where an action is brought in one federal district court and a later action embracing essentially the same issues is brought in another federal court, the first court has jurisdiction to enjoin the prosecution of the second action. See, e.g. Coakley & Booth, Inc. v. Baltimore Contractors, Inc., 367 F.2d 151 (2d Cir. 1966); National Equipment Rental Ltd. v. Fowler, 287 F.2d 43 (2d Cir. 1961).

The United States Court of Appeals for the Second Circuit has consistently held that even where the parties to the actions in two different districts were not the same, but were based on the same facts, and where a decision in the first case would dispose of the action later brought in another

United States district court that a stay was a proper remedy to prevent a multiplicity of litigation and the consequent major expenses involved.

This rule has been applied by this and other courts even where the parties in the two actions are not identical.

In Telephonics Corporation v. Lindley & Co., 29[illegible] F.2d 445 (2d Cir. 1961) in Action #1, A sued B in New York for a declaratory judgment that B's patent was invalid. In Action #2, B sued C, as a customer of A in North Carolina alleging infringement of that same patent. There was an indemnity agreement running from A to C. This Court of Appeals affirmed the New York District Court's order enjoining B from continuing the action in North Carolina the Court stating:

> "The action subsequently begun against plaintiff's customer in North Carolina was simply an attempt to litigate in another forum a dispute that is basically between the plaintiffs and the defendant. Since the order below permitted Glen Raven (the customer) to intervene as a party plaintiff in the present action, defendant may have any affirmative relief that is justified against Glen Raven by way of counterclaim here. The fact that the North Carolina action was brought against a defendant not originally a party to the New York action is thus no bar to the grant of the injunction appealed from." (Emphasis supplied.) 291 F.2d at 447.

Rostam started its suit by service of a summons upon Ennis in Texas on December 1, 1971. The action was thus commenced for all purposes in the New York State Supreme Court under Civil Practice Law and Rules then in effect.

§ 203. Method of computing periods of limitation generally.
(a) Accrual of cause of action and interposition of claim. The time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed.
(b) Claim in complaint. A claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with him when:
1. the summons is served upon the defendant;

The starting date of Rostam's action, as provided by said statute, is December 1, 1971. Ennis served its process on Rostam by mail in May of 1974. Rostam unquestionably had priority.

This Court in deciding Meeropol et al, appellants v. Nizer et al, appellees, docket number 74-1587, decided on October 17, 1974, affirmed its prior position:

> "Where an action is brought in one federal district court and a later action embracing the same issues is brought in another federal court, the first court has jurisdiction to enjoin the prosecution of the second action."

The Court below erred in denying Rostam's application to stay Ennis Texas action.

POINT II

Ennis action in Texas was required to be asserted in Rostam's action in the lower Court

Rostam's original and amended complaints in the lower Court, and Ennis' complaint in the Texas action arose out of the same subject matter.

Federal Rules of Civil Procedure § 13 (a) pertinent to this state of affairs reads:

> 1963 Amendment:
>
> Rule 13 (a) was amended as follows (deleted matter is in brackets; new matter is italicized):
>
> (a) COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. [Except that such a claim need not be so stated]But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

The foregoing excerpt is from Benders Federal Practice Manual, 1972 Cumulative Supplement, at page 62. This section, as amended in 1963, required Ennis to litigate whatever claims it had against Rostam, by pleading them as a compulsory counterclaim since

1. The Rostam action has been judicially determined by the lower Court to have had priority.

2. The complaint in the lower Court in behalf of Rostam, and the complaint in Ennis' Texas action arise out of the transaction or occurrence that is the subject matter of both actions.

3. Third parties beyond the jurisdiction of the United States District Court for the Southern District of New York required for the adjudication of the subject matter do not exist.

4. When Rostam commenced its action on December 1, 1971, Ennis' claim was not then the subject of another pending action.

5. This action in behalf of Rostam did not arise out of an attachment or other in rem proceeding.

6. The lower Court acquired jurisdiction to render a personal judgment against Ennis.

The facts in the Court below as to the various legal proceedings are not controverted. As a matter of law Rule 13 (a) applies squarely to the instant action.

Under Rule 13 (a) as stated, Ennis either had to respond with any claim it had against Rostam by an answer setting forth a compulsory counterclaim (underlining supplied), or it would be estopped from asserting such claim thereafter against Rostam. Dindo v. Whitney, 1971, CA1, N.H., 451 F.2d 1. Failure to assert a compulsory counterclaim resulted in a bar

to a second action on the theory of res judicata. Dolfi Music v. Forest Inn, Inc. 1973, D.C., Wis., 59 FRD5.

Rule 13 (a) was adopted for the express purpose of preventing a multiplicity of actions. It was intended to provide one action to dispose of all disputes arising out of common matters, with the entire thrust of the section being asserted against one who fails or evades filing a counterclaim in favor of instituting an independant action in which the subject matter of his counterclaim becomes the subject of his complaint in such action. The issuance of a stay against such second action was held to be the proper procedure. Southern Construction Co. v. U.S. (1962), 371 U.S. 57, 9L Ed 2d 31, 83 S. Ct. 108.

However, Rostam is burdened with litigating two actions unless a stay is granted. Rule 13 (a) is mandatory. Pennsylvania R.R. Co. v. Musanta-Phillipe, Inc. (1941 D.C. Cal.) 42 F Supp 340.

The action of the Court below in denying Rostam's application for a stay was improper as a matter of law and has only caused the unnecessary and expensive duplication of litigation, a result not intended by Rule 13 (a).

SUMMARY

The order of the Court below denying Rostam's application for a stay was wrong as a matter of law and should

be reversed. Ennis should be stayed and any counterclaim should be asserted in the action under Rule 13 (a).

Respectfully submitted

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STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 31 day of JAN. , 1975 deponent served the within Brief upon Kayes Scholer, Fierman Hays & Handler

attonrye(s) for Deft - App. - Appellee

in this action, at 425 Park Av.
New York, N.Y. 10022

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey
ROBERT BAILEY

Sworn to before me, this
31 day of JAN. , 1975.

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976